No. 83-1180

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LIANE BUIX McDONALD,
on her own behalf and on behalf of
all others similarly situated,

Petitioner,

v.

UNITED AIR LINES, INC.
and
ASSOCIATION OF FLIGHT ATTENDANTS
and
JOYCE BARR,

Respondents.

BRIEF OF UNITED AIR LINES INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the district court properly exercised its equitable discretion, affirmed by the Seventh Circuit, in light of the principles of *United Air Lines Inc.* v. *Evans*, 431 U. S. 533 (1977), involving both a member of plaintiff class and the very seniority system at issue, as recognized in *International Brotherhood of Teamsters* v. *U.S.*, 431 U. S. 324 (1977) and in *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), thereby depriving plaintiff class of any support for its claim, raised in the face of those principles by their petition for certiorari, that *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976) controls this case and mandates reinstatement with the maximum amount of complete retroactive seniority.

PARTIES TO THE PROCEEDINGS

(a) Carole Anderson Romasanta and eleven other named individuals were respectively the original named Plaintiff and subsequent Intervenors in a class suit filed May 15, 1970. They obtained relief by a final judgment entered on October 3, 1975.

Petitioner Liane Buix McDonald was a putative member of the *Romasanta* class but was excluded from the class by order entered December 6, 1972 because she had not protested the no-marriage rule of United Air Lines, Inc. ("United"). On October 21, 1975 McDonald petitioned to intervene in order to appeal from the final order of October 3, 1975, which reiterated the December 6, 1972 action excluding non-protestants from the class. She was ultimately held to have had the right so to intervene and appeal. *United Air Lines Inc.* v. *McDonald*, 432 U. S. 385 (1977). She was an Appellant-Cross-Appellee in the Court below.

(b) Respondent United Air Lines, Inc., is a Defendant. It was an Appellee-Cross-Appellant in the Court below.

(c) Respondent Association of Flight Attendants intervened in the District Court to represent the interests of incumbent United Air Lines flight attendants. It was an Appellee in the Court below.

(d) Joyce Barr, respondent and one member of the class, filed separate briefs, denominated as those of an intervenor.

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United Air Lines, Inc.[1] ("United") opposes the petition for certiorari to the United States Court of Appeals for the Seventh Circuit filed by plaintiff class.

[1] United Air Lines, Inc. is a corporation, and its parent corporation is UAL Inc. with offices at 1200 Algonquin Road, Elk Grove, Illinois 60666.

THE OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals For The Seventh Circuit is published in 717 F. 2d 1140, and reprinted in the Appendix to the petition for certiorari (pp. 1a-39a). The Memorandum Opinion of the District Court, from which the interlocutory appeal here involved was taken, is published in 27 EPD ¶ 32,353 and reprinted in the Appendix to the petition for certiorari (pp. 40a-93a).

JURISDICTION

The Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit, filed by the plaintiff class under 28 U. S. C. § 1254(c) to review the Opinion and Judgment of September 21, 1983, was received by United on January 20, 1984, rehearing having been denied on October 20, 1983.

STATUTORY PROVISIONS

42 U. S. C. § 200e(5)(g) (in part):

> "...[T]he court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate which may include, but is not limited to, reinstatement or hiring of employees with or without back pay ... or any other equitable relief as the court deems appropriate."

STATEMENT OF THE CASE

The Litigation Background

The life of this most venerable of Title VII[2] cases has hung by the thinnest of threads since August, 1966, when Mary Burke Sprogis filed a charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC") protesting her discharge as a flight attendant because of United's no-marriage rule. A 2-1 decision of the Seventh Circuit in 1971, the reasoning of which was trenchantly dissented from by Judge (now Mr. Justice) Stevens and which has been expressly disapproved by other courts, was the first technical life support system supplied this litigation. Compare *Sprogis* v. *United Air Lines Inc.*, 444 F. 2d 1194, 1202 *et seq* (1971), *cert. den.* 404 U. S. 991 (1971), with *Stroud* v. *Delta Air Lines, Inc.*, 544 F. 2d 892, 894 (C. A. 5, 1977). United is the only major airline to have been held liable because of a no-marriage policy for stewardesses, which was virtually universal in the industry and which United abandoned long before the first adverse judicial adjudication thereon was rendered against United and very shortly after the EEOC had finally concluded (after some two years of indecision) that the no-marriage policy violated Title VII.

More than five years later the Seventh Circuit, again 2-1 over a vigorous dissent, permitted a much-delayed filing of a petition to intervene by Liane Buix McDonald to establish a class action after class certification had three years previously been denied by the District Court and after the claims of all those class members who had filed timely charges had been satisfied. *Romasanta* v. *United Air Lines, Inc.*, 537 F. 2d 915, 920 (C. A. 7, 1976). This was affirmed 5-3 by this Court (Mr. Justice Stevens taking no part). *United Air Lines Inc.* v. *McDonald*, 432 U. S. 385 (1977).

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[2] 42 U.S.C. § 2000e-5(b) confers jurisdiction of Title VII actions upon the United States district courts.

Subsequently, the class was certified as all United stewardesses who terminated because of the no-marriage rule between July 29, 1965 and November 7, 1968 (when the no-marriage rule was withdrawn), even though no present member of the class (including the named class representative) may have filed timely charges upon her termination. *McDonald* v. *United Air Lines Inc.*, 587 F. 2d 357, 361 n. 10, n. 12 (C. A. 7, 1978), *cert. den.*, 442 U. S. 934 (1979). There remained for decision the reinstatement and back pay remedies to be awarded the class as a whole and the many hundreds of claims by individuals who asserted that they were members of the class. The Seventh Circuit stated that claimants "must, as counsel for plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief." (587 (F. 2d 357, 360 n. 4.))

The class reinstatement remedy is the subject of the Seventh Circuit decision as to which the plaintiff class here seeks certiorari. The District Court has under advisement but has not yet ruled on the back pay relief to be awarded the class.

The many hundreds of individual entitlement hearings commenced in April, 1983, before several special masters and as of February 17, 1984 some 512 claims out of a potential total of almost 1800 have been heard.

The Factual Background.

The position of the present-day flight attendant has changed dramatically since the 1965—1968 time period of class membership here. "The claimants left a marginally attractive position and seek return to one providing far better compensation, working conditions and benefits even for entry-level employees." (App. 86a.) A flight attendant with top compensation ("non-competitive") seniority earns well over $35,000 a year. (The annual salary in the mid-sixties was $4,100 for more hours of actual working time.) A great part of achieving this "more lucrative, more permanent and generally

more desirable [job] than the [plaintiffs] were forced to leave" (App. 62a) was the result of the efforts of the more senior incumbent flight attendants and of a labor union of which none of the plaintiffs was even a member.

The devastating effect on incumbent flight attendants of granting the large plaintiff class seniority for reinstatement (competitive) purposes cumulative for the entire sixteen to nineteen years which have passed since the marriages of plaintiff class members and the termination of their employment at United is depicted in the thorough analysis made by the district court and affirmed by the Seventh Circuit. No more accurate and convincing statement of this aspect of the case could be made in this Brief, and the Court is therefore referred at this juncture to pages 60a-81a, 87a and pages 20a-30a of the Appendix to the petition for certiorari.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

1. The Evans Case Provides A Compelling Alternative Ground For Upholding The Decisions Below Denying Retroactive Seniority For Reinstatement (Competitive) Purposes.

After extensive hearings into the impact of granting the plaintiff class seniority as if they had been continuously employed by United as flight attendants for the past sixteen to nineteen years, the District Court, in a very detailed and comprehensive opinion, decided that, for reinstatement (competitive) purposes, the impact on United's incumbent work force was so unusually adverse as to call for denial of such complete retroactive seniority. The Seventh Circuit affirmed, holding that the District Court had properly

> "reconciled the language in *Franks* and *Teamsters* by applying the *Franks* presumption, requiring United and AFA to carry the burden of demonstrating 'unusual adverse impact', and relying on the factors enumerated in *Teamsters* as relevant to that showing. Absent any explicit statement in *Teamsters* that the standard enunciated in *Franks* was no longer viable, we believe the approach taken by the district court is correct and have followed the same mode of analysis on appeal" (App. 30a; 717 F. 2d, at 1156.)

In the light of the above, what the Seventh Circuit did not need to consider was the ground urged by United in support of the denial of retroactive seniority for reinstatement purposes, namely:

1. The *Evans* case (431 U. S. 553), in and of itself (431 U. S., at 458-9) and as interpreted in *Teamsters* (431 U. S., at 348, n. 30) and *Zipes* v. *Trans World Airlines, Inc.* 455 U. S. 385, 401-2, 401 n. 1), precludes the granting of any such full 'make-whole' equitable relief, because in *Evans* a member of the very plaintiffs' class involved here was denied retroactive

seniority after her re-hire by United for the reason that she—*like every present or potential member of the plaintiff class*—had not filed timely protest against her termination under the no-marriage rule.

2. In the *Evans* situation, this Court stated that "our decision in *Franks* v. *Bowman Transportation Co., supra,* does not control this case." (431 U. S., at 458-9) [The Seventh Circuit had reversed itself on rehearing in *Evans* because of the intervening decision in *Franks* v. *Bowman,* but this Court upheld the initial panel's decision that Evans' claim to retroactive seniority was time-barred and not aided by *Franks* v. *Bowman.*]

3. The *Evans* decision came down on the same day as *Teamsters,* and was referred to in footnote 30 of the *Teamsters* opinion (431 U. S., at 348) as broadly holding that

> "the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee."

4. In the *Zipes* case Mr. Justice Powell took that same position in his concurring opinion, joined in by the Chief Justice and Mr. Justice Rehnquist: Under the *Evans* case the equitable remedies available under *Franks* and *Teamsters* do not extend to those discriminatees who have not filed timely charges of discrimination. Therefore, *Evans* should have been but was "not discussed in the Court's [majority] opinion" in *Zipes,* which should have made clear "that a timely charge, as well as a violation of Title VII, is a prerequisite to disturbing rights under a bona fide seniority system protected by § 703(b). This was made clear in *United Airlines, Inc.* v. *Evans,* 431 U. S. 553, 559 . . ." (455 U. S., at 401-2.) Indeed,

> "In *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747 (1976), timely charges of discrimination had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they

> would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a district court should consider these equities in determining whether to award competitive-status seniority . . ." (455 U. S., 401, n. 1.)

The foregoing, rather conclusive argument against the position taken by the plaintiff class in their petition for certiorari—that *Franks* is an automatic rule of law mechanically requiring full retroactive competitive seniority—was expressly reserved by the Seventh Circuit:

> "United also relies on this argument as an alternative ground in support of the district court's judgment regarding competitive seniority. Because we have resolved that issue on the grounds set forth in the district court opinion, we will not consider United's alternative ground in that context." (App. 32a, n. 12)

The simple fact is that plaintiffs' class suit is a hollow shell, thinly disguising a group of persons hoping for a windfall on the ground that they have succeeded in establishing legal standing to sue as a class which is not technically barred by any jurisdictional time barrier. But because no present member of the class filed timely charges upon her termination (*McDonald* v. *United Air Lines Inc.*, 587 F. 2d 357, 381 n. 10, n. 12 (C. A. 7, 1978)), the class' substantive standing is of the most barren and inequitable nature. Plaintiffs' class brings no favorable equities into this case—only the bare legal right not to have been terminated in 1965-1968. That right is given ample remedy by reinstatement from furlough according to actual time served as a stewardess, as ordered below, and by the class back pay award which has yet to be entered.

2. The Class' Petition Misstates The Procedure And Rationale Adopted By The District Court, Including The Considerations Relevant To The So-called "Openings Proposal".

In its attempt to castigate the lower courts' well-reasoned decisions, the plaintiff class resorts to serious distortions which should not be considered by this Court. The district court, sitting in Equity, properly considered the impact of full reinstatement of 1100-1400 class members because all parties, including the plaintiff class (save Respondent Barr), concurred prior to the hearing on seniority that the matter should be considered on the basis that at least that number of the 1800 claimants would successfully seek to be reinstated with full seniority. The determination on this basis that less than full retroactive seniority should be granted cannot now be used to fault retroactively the procedure and rationale adopted by the district court. It was essential that a claimant's decision whether or not to seek reinstatement in addition to backpay be informed by fore-knowledge of the seniority to be awarded. If the court had deferred consideration of the reinstatement seniority issues, claimants would have been required to speculate on the results. The court with all parties' concurrence (save Respondent Barr's) accordingly decided to measure the remedy first. The class' disenchantment with the result does not suggest a need for Supreme Court review.

Moreover, the district court properly recognized the class' so-called "openings proposal" as a sham. The conditions imposed on the proposal, including the accrual of millions of dollars in front pay while class members awaited openings in the work force, deprived the plan of any mitigating force as to adverse impact. Faced with an obligation to pay both a waiting class member and a working incumbent for the same job, United would act rationally by exercising its contract rights to furlough incumbents in order to reinstate class members. These furloughs would not be "false vacancies", but ony the necessary economic result of plaintiffs' proposal. The ultimate effect

would be the same as immediate reinstatement of class members with the same resulting unusual adverse impact which the district court found unwarranted. The class' blizzard of epithets (Petition, pp. 16-17) does not change these economic realities. Neither do those charges support its petition.

CONCLUSION

Should this Court somehow feel that there is any merit to the petitioners' criticism of the thorough and exhaustive approach taken by both the district court and the Seventh Circuit in respect to seniority for reinstatement (competitive) purposes, then the alternative ground offered by *Evans* for supporting that decision below should independently suffice to demonstrate that the writ should not be granted.

Respectfully submitted,

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